In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 419

PATRICIA DE ALESANDRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 361 F. 2d 694.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1966. On July 19, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to August 5, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury that it could consider petitioner's allegedly false

230-488—66

exculpatory statements as evidence of guilt without giving an instruction (not requested by petitioner) that they must first find that she was advised by the arresting officer of her constitutional rights.

2. Whether the prosecutor's conduct of the trial and summation to the jury were improper.

3. Whether the court's instructions failed to present the theory of the defense.

4. Whether the petitioner was twice placed in jeopardy or denied due process by the submission of her case to the jury in two counts.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of New York of attempting to bribe and corruptly endeavoring to influence a petit juror, in violation of 18 U.S.C. 201 and 1503. She was sentenced to five years' imprisonment on each count, the terms to run concurrently. The court of appeals affirmed (II A. 21a–31a).[1]

The government's evidence showed that on May 18, 1965, Kenneth Feldman, a juror in a pending narcotics case entitled *United States* v. *Armone,* was approached by petitioner at the store where he was employed and was induced to make a dinner date for that night (I A. 11a–17a). In making a purchase, petitioner gave her address as Central Park West (I A. 13a), although she lived on West End Avenue (I A. 52a). During the evening, petitioner turned the conversation

[1] "A." refers to the two volumes of appendices filed in the court below.

to a discussion of Feldman's jury service. She complained of the unfairness of the judicial process (I A. 19a), particularly in the case of a friend who was then on trial. She stated that, in that case, the government was using a witness who had been induced to testify by a reduction in his sentence from fifteen to five years. The friend's name, she volunteered, was Steve Armone (I A. 20a). Despite Feldman's protests and attempts to change the subject, petitioner pressed the subjects of his service on the jury, his salary, the cost of acquiring a shoe shop of his own, and a trip to Europe. Finally, petitioner stated in an inquiring tone, "Five thousand dollars?" Feldman said that he thought the conversation had gone far enough, but petitioner continued, "Suppose a proposition were made to you whereby at the right time you would remember who your friends were?" (I A. 21a–22a). Feldman then obtained the dinner check and took petitioner to West End Avenue where she said she was to meet a friend (I A. 23a). The next morning, he reported the incident to the Bureau of Narcotics, whose agents took him to the trial judge. The judge, after hearing his story, excused him from further service (I A. 24a).

Agents of the Federal Bureau of Investigation at once began a search for petitioner and her husband, but were unable to find them in New York. Petitioner was finally arrested almost two months later in California (I A. 35a). At the time of arrest, the agent advised petitioner that she was entitled to the advice of counsel, that she need not say anything and that anything she said might be used against her

(I A. 36a). On the way to the jail, petitioner asked the nature of the charges against her. When told they related to an approach to a juror in a narcotics trial, she denied that she knew anything about a narcotics trial or had anything to do with any juror sitting in such a case (I A. 36a). When asked why she had left New York, she said she had been having marital difficulties (I A. 36a).

Petitioner's version of the events of May 18 is as follows: Feldman invited her to dinner, and, because she had been fighting with her husband, she accepted (I A. 56a). At dinner Feldman told her how much work he had to do because he was on jury duty. She told him to take a vacation when it was over and mentioned how much her husband had enjoyed Europe (I A. 61a–62a). The only mention of $5,000 was Feldman's statement that his boss had offered him a partnership in a new store for that amount (I A. 62a). Feldman told petitioner the name of the case in which he was serving as a juror, and she said she used to know someone named Armone. He asked her how well she knew Armone and said, "Maybe I could get a shoe store out of this for myself?" (I A. 63a). She did not take the matter seriously because Feldman had been drinking (I A. 63a–64a).

As to her rapid departure from New York, petitioner testified as follows: She quarreled with her husband after her dinner with Feldman and decided to leave town. She first went to an apartment owned by her sister-in-law on City Island and then to her mother's home in Michigan. Her mother told her that two men had been to the house and had said

that her husband was in jail, and that they wanted to question her. She thought this was one of her husband's tricks (II A. 66a). She and her mother then drove to California (I A. 67a).

Petitioner further testified that, when arrested, she asked the agent what was wrong and he told her she was wanted for questioning about the attempted bribery of a juror. She said that when she asked whether she needed a lawyer, the agent replied she did not need one then, but that one would be appointed in New York if she needed it (I A. 68a). She subsequently testified that the agent questioned her about a narcotics trial in New York and that she told him she knew nothing about a narcotics case. She said she admitted knowing Feldman but denied knowing that he was on a narcotics case (I A. 92a–93a). She also said she had told the agent about her marital troubles (I A. 69a).

The judge charged the jury that, if they found that the defendant gave misleading statements to the F.B.I., they could consider such false statements as circumstantial evidence showing consciousness of guilt (I A. 125a).

ARGUMENT

1. There is no merit in petitioner's principal contention (Pet. 26–31) that the trial court should have instructed the jury not to consider petitioner's allegedly false exculpatory statements unless it first found that the arresting officer had advised her of her constitutional rights. Petitioner did not request such an instruction and was not prejudiced by the court's failure to give it *sua sponte*. The admissibility of

petitioner's remarks—the context in which the question of effective warning ordinarily has relevance—is not disputed. Not only was there no objection to the officer's testimony as to petitioner's statements; petitioner herself testified to making substantially the same exculpatory remarks. Petitioner obviously wanted the jury to know of her statements, since they tended to show that she had professed her innocence from the first encounter with federal agents. While hoping to benefit from this evidence, however, she necessarily ran the risk that the jury would find that the story she told the arresting agent was untrue. It was proper for the judge to inform the jury that, if they so found, they could consider the falsity of her statement as relevant to the question of guilt.[2] Having offered testimony which could freely be considered in her favor, petitioner cannot prevent it from being considered against her without a finding as to whether she was warned of her rights. Nor can she successfully question the absence of such a warning for the first time on appeal. See *United States* v. *Indiviglio*, 352 F. 2d 276 (C.A. 2), certiorari denied, 383 U.S. 907.

[2] Petitioner suggests that, aside from the question of warning, the "false exculpatory statement" charge was inappropriate on the facts of this case. But, as petitioner recognizes (Pet. 30), her exculpatory statements consisted of more than a mere assertion of innocence. She also gave an explanation of her hurried departure from New York, which the jury might have considered to be a fabrication, and thus indicative of consciousness of guilt. Even if her only remarks were protestations of innocence, however, petitioner has not shown how she was prejudiced by the court's instruction that the falsity of her story, if it were disbelieved, could be considered as showing consciousness of guilt.

2. Petitioner's complaints (Pet. 31–36) about the prosecutor's conduct of the trial and summation were not the subjects of objections in the district court. As the court of appeals pointed out, the prosecutor's remarks that Feldman had been a juror, like the jurors the prosecutor was addressing, were not beyond the bounds of propriety in a jury-tampering case. They clearly do not justify reversal in the absence of objection (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238–239), particularly where the evidence was as strong as it was here.

3. The court did not err in refusing to give petitioner's requested Instruction No. 2 (Pet. 3), for which there was no basis in the evidence. See *United States* v. *Gosser*, 339 F. 2d 102 (C.A. 6); cf. *Lopez* v. *United States*, 373 U.S. 427. The requested instruction was that if the jury believed that petitioner "responded in kind" to Feldman's loose talk about jury tampering, the jury could find that she did not have an intent to corrupt. But throughout her own testimony, petitioner steadfastly denied that she "responded in kind," even in jest, to Feldman's alleged joking suggestions. On the contrary, she testified that she told him in all seriousness that she would not involve herself "in anything like that" (I A. 63a). The jury was clearly instructed that, to convict, they had to find each element of the offenses charged, including intent (see I A. 118a, 121a).

The claim that there should have been an "accomplice" instruction, although none was requested (Pet. 37–40), is similarly without merit. Neither on the government's evidence nor on petitioner's could

complainant Feldman properly be considered an accomplice.

4. Petitioner argues (Pet. 40–42) that, although she received concurrent sentences, it was unfair to charge her in two counts, one under 18 U.S.C. 201(b) for offering a thing of value to a juror, and the other under 18 U.S.C. 1503 for endeavoring to influence a juror and impede the due administration of justice. Congress, however, explicitly provided in Section 201(k) that the offenses and penalties covered by Section 201 are separate from and in addition to those prescribed in 18 U.S.C. 1503, 1504, and 1505. Petitioner therefore could properly be separately charged for the crime defined in Section 201(b), which has an element not involved in Section 1503—the offering of a thing of value. Indeed, the conjunction of the two charges clarified for the jury the necessity of finding that explicit fact under Section 201(b).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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